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No. 90-963

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

EDWARD WALSH, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL,
Petitioner,

vs.

BANK OF AMERICA, N.T. & S.A.,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal First Appellate District, Division Two

PETITIONER'S REPLY BRIEF

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I

PRELIMINARY STATEMENT

By failing to address the key issue in the Jewells' petition, the Bank concedes its merit. In the face of the Jewells' accusation that the decision below in effect authorizes courts to place Constitutional rights behind concerns for judicial economy, the Bank stands mute. That silence is an eloquent statement of why review should be granted.

II

THE JEWELLS DID RAISE THE QUESTION PRESENTED IN THE STATE COURT PROCEEDINGS

The Bank argues that the Jewells failed to raise the question presented in the state court proceedings, yet concedes it *was* raised before the California Supreme Court, as evidenced by the excerpts from the Jewells' reply brief in the Bank's Appendix. To evade the effect of that document, the Bank argues that the Jewells raised the issue too late and in violation of California rules of practice, which allegedly govern this Court's determination. Both of these arguments lack merit.

First, the requirement that the federal question be raised in the court below is liberally construed. (*Webb v. Webb* (1981) 451 U.S. 493, 501.) This means that it is not necessary to raise the federal question in any specific manner since this Court's "jurisdiction does not depend on citation to book and verse." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 113, fn. 9.) As this Court has noted:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (*People of State of New York ex rel. Bryant v. Zimmerman* (1928) 278 U.S. 63, 67.)

The requirement that the federal question be raised in the state court at the first opportunity allows the lower court to correct any Constitutional violations; that first opportunity may arise as late as a petition for rehearing before

a state's highest court. (See, e.g., *Picard v. Connor* (1971) 404 U.S. 270, 275; *Brinkerhoff-Faris Trust & Savings Co. v. Hill* (1930) 281 U.S. 673, 677-78.)

Here the violation did not occur at the trial level; thus, it was impossible for the Jewells to raise it before that court, as required by this Court's Rule 14(h). It was, however, raised before the California Supreme Court, the first court above the court that committed the violation. The California Supreme Court was obviously aware of the issue since it accepted the Jewells' reply brief, in which the violations were first described as being of Constitutional dimension. Had the California Supreme Court believed that the reply brief was improperly filed, as the Bank now contends, it would have simply rejected it. Since the record shows that the claim was brought to the attention of the state's highest court before that court denied review, then "the claim is to be regarded as having been adequately presented." (*People of State of New York ex rel. Bryant v. Zimmerman, supra,* at 67.)

Second, whether the federal issue was properly raised below is arguably a *federal* question; this Court is therefore not bound by how a state court would decide the issue. (*Street v. New York* (1969) 394 U.S. 576, 583; *Ellis v. Dixon* (1955) 349 U.S. 458, 463.) However, even if state law did control, the result would nevertheless be the same: The issue was in fact before the California Supreme Court when it denied review.

That is so because of California Rule of Court 28(e)(2), which deals with petitions for review filed with the California Supreme Court. The rule notes that the statement of issues presented in the petition "will be deemed to comprise every subsidiary issue fairly included in it," and that the issues listed, as well as those issues "fairly included in them," will be considered by that

court. In addition, that court has the power to make exceptions to this liberal rule in the same manner that this Court does pursuant to its own Rule 14(i). (Advisory Committee Comment to California Rule of Court 28.) Thus, there is no reason to assume the California Supreme Court did not consider the Constitutional issue the Jewells placed before it.

III

THE PETITION DOES PRESENT A FEDERAL QUESTION

The Jewells recognize that there are cases which hold that the Seventh Amendment has not been incorporated into the Fourteenth; however, that does not prevent this Court from addressing questions relating to rights under the Seventh Amendment that arise in state court proceedings. As this Court recognized in a case which has never been overruled or questioned, the portion of the Seventh Amendment that precludes certain reexaminations of facts tried by a jury "applies equally to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state." (*Chicago, B.& Q. Ry. Co. v. City of Chicago* (1897) 166 U.S. 226, 242.)

In addition, California has incorporated the Seventh Amendment into its own constitution, and considers the right to a trial by jury to be guaranteed by both constitutions. (*Small v. Transcontinental & Western Air* (1950) 96 Cal.App.2d 408, 410.) As a result, a deprivation by a California state court of the right to trial by jury would simultaneously constitute a violation of both federal and state constitutions, a violation which only this Court can vindicate if the state courts choose to ignore it.

IV

THE PETITION DOES PRESENT AN IMPORTANT ISSUE OF LAW

The Bank is correct that the Jewells contend the appellate court swept aside controlling state law precedent and arbitrarily announced a new procedural rule. That new rule violates the right to a trial by jury, and grants courts total, unfettered discretion in determining when and how that right can be violated.

Contrary to the Bank's contention, there is arguably only one exception to the rule established in *Erlin v. Nat. Union Fire Ins. Co.* (1936) 7 Cal.2d 547, an exception which has not been recognized in any California Supreme Court decision. That exception, first recognized in *Stromer v. Browning* (1968) 268 Cal.App.2d 513, is not applicable here, a fact the Bank does not, and cannot, dispute since the court below specifically held it was inapplicable. (*Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 620-23, modified at 220 Cal.App.3d 1655b.)

Equally inapplicable is the statutory provision the Bank claims supports the decision below: California Code of Civil Procedure section 629, which deals with judgments notwithstanding the verdict. The Bank concedes as much; it acknowledges that the court below specifically recognized it could not apply section 629 because the Bank had not relied on it and because the technical requirements for its application had not been met. (*Bank of America v. Superior Court, supra,* at 624-26.) The Bank nevertheless argues that the statute should still be applied to avoid "subverting" the "policy" behind the statute, a radical position adopted by the court below that has no justification in the law.

The Jewells do not dispute that there are certain recognized situations in which the resolution of a case may be "taken away" from a jury. However, in each of those situations there are generally mandatory statutory requirements that are strictly applied. (See, e.g., *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899.) The Jewells know of no rule recognized by any jurisdiction which permits an appellate court to enter judgment in favor of an appellant when a jury has found in favor of the respondent solely to avoid "an unending roundelay of litigation." (*Bank of America v. Superior Court, supra,* at 626.)

That is precisely what occurred here, in direct violation of established California law allowing litigants the right to retry their cases after general reversals. (*Erlin v. Nat. Union Fire Ins. Co., supra,* at 548-49.) Worse, that result is likely to be repeated by virtue of the lower court's published opinion, leading other courts to freely interpret the Constitutional right to a trial by jury and to deny litigants that right when doing so furthers judicial economy.

V

CONCLUSION

Recently the Constitution was carefully examined by Congress to determine if certain provisions should be literally interpreted, and what our Founding Fathers intended when the provisions were adopted. The Seventh Amendment is another provision which needs to be reexamined and reevaluated by this Court in light of its decreasing significance to many courts. By employing tactics such as those used in this case, courts are raising the very real possibility that a litigant's ability to have a case decided by a jury of his or her peers may soon

become a privilege reserved to a chosen few rather than a right protected for all. The Jewells respectfully request that their petition be granted, and that this troubling trend be reversed.

Respectfully submitted,

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